

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

DIVISION I

CACR06-906

May 16, 2007

PERRY JOSHUA

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION [CR2003-4280]

HONORABLE WILLARD PROCTOR,
JR., JUDGE

AFFIRMED

Appellant, Perry Joshua, was found guilty of residential burglary and theft of property in a bench trial in Pulaski County Circuit Court. The trial court also revoked his probation in two other cases. On appeal, he argues that his convictions and revocations should be overturned and that he should be acquitted by reason of mental defect and sent to the Arkansas Department of Health and Human Services for appropriate care and treatment. We affirm the trial court's determination that Joshua was competent to stand trial.

Competency Hearing

The trial court held a competency hearing on March 4, 2005. Joshua testified at that hearing. It is difficult to summarize his testimony because it was disjointed and

confusing, as evidenced by the following excerpts. He said that he had not been able to help his attorney very much, but then he did not know if he had tried. He said that he did not know how he acted at the State Hospital when the doctors tried to evaluate him. He stated that he did not know what the waiver-of-rights statement was, although he saw his signature and his initials on the piece of paper. He testified that he did not remember being read his rights about the crimes that occurred in September 2003, that he just remembered a little bit about that day, and that he “wasn’t right.” He remembered ringing the lady’s doorbell; that it was not right to walk into someone’s house without ringing the doorbell; and that “he” let him in the house. He said that he was not shocked because the plan was to burglarize the house and steal, but then he said that there was no plan, that it was not him and he did not hear anyone planning. He did not remember being shocked when he saw the victim being tied up and hit.

Joshua testified that he had been arrested and charged with crimes before, but he did not know how many convictions he had. He said that he could read when he went to jail. Joshua testified that he did not remember living at the State Hospital for a while, but then he said that he did remember going to the State Hospital. He said that it was, and then that it was not, true that he was making his statements up to try and get out of trouble for the crimes he had committed. He said that he “ain’t depending on Act 3,” that he was depending on something else, and that he had a “more deep, deep problem.”

Defense witness Rebecca Caperton, a clinical psychologist, testified that she had previously been involved with Joshua in another case. She said that she evaluated Joshua

in September 2004 and concluded that he had depressive disorder and was moderately mentally retarded. She ruled out seizure disorder, although she said that Joshua would just “all of a sudden” lose all contact with her, and it would be a minute or two before he would “come back.” She did not know if Joshua had seizures, even though he told her that he did. However, she said that although she was not a medical doctor, she believed that Joshua had seizures. Caperton determined that Joshua’s IQ was fifty-five. She also related that Joshua had suffered a head injury in a car accident.

Caperton testified that Joshua did not understand the Miranda warnings he had been given. She explained that when she told him that he had the right to an attorney, he said that you write on paper. She said that although he had a rudimentary understanding of some of the words, Joshua did not grasp a more complex context. Caperton said that Joshua was given the test of malingered memory three times: that he first scored thirty-nine, which indicated some malingered or problems with memory, but that on the third try, he got a perfect score.

It was Caperton’s opinion that Joshua was not able to assist his attorney in his defense and that he was not capable of proceeding to trial. She said that if she got beyond simple three-to-five word questions, Joshua was lost; that he was able to get the bare bones, but if it was too complex, he could not get the whole picture.

On cross-examination, Caperton stated that she did not think Joshua knew that he had a reason to “fake” his mental status, although he knew that criminal charges were pending against him. She said that Joshua gave her no indication that he knew that if he

should be found not guilty by reason of mental disease or defect he could avoid criminal responsibility. Caperton said that in her opinion, mental retardation rendered Joshua irresponsible for his criminal conduct, that he could not conform his conduct to the requirements of law at the time she evaluated him, and that he did not have the capacity to appreciate the criminality of his conduct.

Genetta Joshua, Joshua's mother, testified that since he was a child, Joshua had attention-deficit disorder and hyperactivity, which affected his ability to go to school because he could not learn the way he was supposed to and could not stay seated and pay attention. She said that Joshua was placed in special classes and that he quit school because he was having a lot of problems. She said that he was in a car wreck when he was sixteen, and when he began to just stare and not comprehend what she was saying, she took him to Children's Hospital, where she was told that he had brain damage. Ms. Joshua said that paranoid schizophrenia ran in the family, and she thought that paranoia was present on Joshua's father's side of the family. She said that since Joshua had been in jail, she could not have a good conversation with him because he did not respond very well.

Joshua was then recalled as a witness and offered similar erratic comments. He did testify that he went to the victim's house with Carlos and Tavoris, but that he did not break into her house. He said that he rang the doorbell and was "about to tell" Carlos and Tavoris to come in.

John Anderson, a licensed psychologist at the State Hospital, testified that he had seen and evaluated Joshua on several occasions, the first time being in January 2001.

Anderson stated that he was able to render a diagnosis of malingering during his evaluation at that time, and that Joshua was completely uncooperative during the morning of the exam and only minimally cooperative during the afternoon. He said that Joshua's present behavior was fairly consistent with how he had interacted with him in the past. Anderson was not able to form an opinion as to Joshua's IQ, but he attempted to obtain an estimate of Joshua's current functioning, and on the two equivalent forms of the test that were administered, Joshua obtained IQ scores of less than forty. However, Anderson stated that he felt the results were not an accurate measure of Joshua's intellectual functioning because he had obtained records of a prior evaluation of Joshua in 1999 by Dr. Aukstulis in which Joshua appeared to present as average during his interview. Anderson said that the 2001 results were not valid because in his opinion, Joshua was feigning cognitive and academic deficits.

Anderson said that he next saw Joshua on June 29, 2004, with respect to the present case. After this second evaluation, it was Anderson's opinion that Joshua was feigning symptoms of cognitive deficit and memory problems and was malingering for secondary gain. The basis for this opinion was Joshua's behavior during the evaluation as well as his performance on the various tasks. Although Anderson initially saw Joshua on June 29, Joshua was completely uncooperative at that time. Joshua was subsequently admitted to the hospital for an inpatient evaluation on July 7, which gave Anderson an opportunity to observe him on the unit from July 7 to July 9. Anderson said that a nurse's note indicated that Joshua was uncooperative with the initial nursing assessment and only

mumbled or nodded his head and made an appearance of not understanding the questions. Anderson said that it appeared Joshua's reading ability was at least on a sixth-grade level. Anderson stated that he administered the TOMM test as part of Joshua's assessment, and his performance on the test did not support any memory problems and suggested to Anderson that Joshua was feigning memory deficits. Anderson stated that the behavior Joshua displayed during his current testimony was very much the way he acted during his 2004 evaluation, with vague complaints, incomplete sentences, repetition of questions, and contradictory or inconsistent answers.

With respect to Caperton's opinion, Anderson said that passing a test did not rule out malingering. He also stated that Caperton's opinion about Joshua's lack of fitness to proceed was based on the diagnosis of mental retardation, and there was no current medication for mental retardation. He said that although there was medication that may help a person behaviorally, there was none that he was aware of that could change performance.

On cross-examination, Anderson testified that it was his opinion that Joshua had the capacity to help in his defense, although having seen Joshua's testimony and observing that he acted in conformance with his previous behavior, Anderson said that he understood Joshua's attorney's concerns. He said that he did not think that feigning mental retardation or a brain injury would allow Joshua to be "on the streets doing whatever he wanted to" but rather would place him in the penitentiary or in the State Hospital.

Charles Mallory, a forensic psychologist at the State Hospital, first saw Joshua in November 2004. Mallory testified that, in his opinion, the evidence pointed toward Joshua's readiness to proceed, fitness to proceed, capacity certainly to understand the criminal-trial process and his role as defendant, and certainly the capacity, if he desired, to assist his attorney effectively. His opinion was based upon Joshua's statements to officers and investigators as well as the victim's statement, and he said that after hearing Joshua testify at the hearing, he believed that there were certain signs that indicated malingering. Mallory disagreed with Caperton's estimate of Joshua's IQ at fifty-five, and he stated that he did not think that she could make any estimate based upon his malingering. Mallory said that it was quite clear that Joshua had an antisocial history of conduct starting probably around the age of ten.

At the close of the hearing, the trial court stated that competency was a fluid concept, but found that Joshua was competent to stand trial, stating that Joshua was able to assist his attorney in the preparation of the case and that he had a rational understanding of the process. Joshua was later tried and convicted of the underlying charges on December 16, 2005.

Analysis

On appeal, Joshua argues that the trial court erred in finding him competent to stand trial because it was obvious that he did not fully understand the proceedings against him, that he could not appreciate the criminality of his conduct at the time of the conduct, and that it was obvious he could not assist in his defense. In support of this

argument, first at trial and now on appeal, Joshua points to the fact that he had been adjudicated incompetent in the Fifth Division of the Pulaski County Circuit Court and in Lonoke County.

Our supreme court set forth the standard of review in determining the competency of a defendant to stand trial in *Thessing v. State*, 365 Ark. 384, 390-91, ___ S.W.3d ___, ___ (2006) (citations omitted):

This court has long held that criminal defendants are presumed to be competent to stand trial and that they have the burden of proving otherwise. This court has defined the test of competency to stand trial as “whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him.” The test for competency on appeal is whether substantial evidence supports the trial court’s finding. We have defined substantial evidence as “that which is forceful enough to compel reasonable minds to reach a conclusion one way or another and requires more than mere speculation or conjecture.” When determining whether there was substantial evidence to support a trial court’s ruling regarding competency, this court has held that “[i]t is permissible to consider only the testimony which supports a finding” of competency. We have further held that when there is conflicting expert medical testimony regarding a criminal defendant’s competency to stand trial, this court will not “attempt to weigh the evidence or pass on the credibility of witnesses[.]”

When confronted with conflicting testimony on the issue of fitness to proceed, the finder of fact is the sole judge of the credibility of the witnesses. *Smith v. State*, 282 Ark. 535, 669 S.W.2d 201 (1984). Under this standard of review, there is substantial evidence to support the trial court’s finding that Joshua was competent to stand trial.

The State’s witnesses, Dr. John Anderson and Dr. Charles Mallory, both testified that Joshua was competent to stand trial. Both doctors were of the opinion that Joshua was malingering. Dr. Anderson also testified that Joshua was feigning symptoms of

cognitive deficit. Dr. Mallory was of the further opinion that Joshua could understand the criminal-trial process and could assist his attorney in his defense if he so desired. This combined medical testimony is sufficient to support the trial court's finding that Joshua was competent to stand trial.

Affirmed.

BAKER and MILLER, JJ., agree.